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Nos. 87-253, 87-431, 87-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

and

UNITED FAMILIES OF AMERICA,
Appellants and *Cross-Appellees*

v.

CHAN KENDRICK, *et al.*,
Appellees and *Cross-Appellants*

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

This brief is filed pursuant to Rule 36.2 of the Rules of this Court with the written consent of all parties. It is submitted by the National Jewish Commission on Law and Public Affairs ("COLPA"), a national organization of volunteer attorneys and social scientists that represents Orthodox Jewish interests, *pro bono publico*, in litigation and before legislatures and administrative agen-

cies. In this case, the brief is filed on behalf of the following organizations:

Agudath Israel of America

National Council of Young Israel

Rabbinical Alliance of America

Rabbinical Council of America

Torah Umesorah, The National Society for Hebrew Day Schools

Union of Orthodox Jewish Congregations of America

Union of Orthodox Rabbis of the United States and Canada

INTEREST OF THE AMICUS CURIAE

The decision of the district court in this case has potentially devastating consequences for many social welfare programs conducted by community organizations operated under Orthodox Jewish auspices. The district court held that a publicly financed social welfare program "fraught with the *possibility*" of religious indoctrination is, *ipso facto*, impermissible under the Establishment Clause. On this basis, the district court disqualified all "religious organizations" from participation in federal programs designed to achieve important secular objectives. Organizations within the Orthodox Jewish community are involved in numerous governmentally funded programs, primarily in the New York area, that serve important secular goals. Although these programs rely, in part, on public funds, they utilize such funds for social welfare purposes, not for religious teaching or indoctrination.

This brief is filed to advise the Court that the factual premise on which Judge Richey based his decision is fundamentally erroneous. It is not "inherent" in a religious organization's participation in a program of training or counseling that "matters sacred to conscience" be taught or discussed. There is, we believe, no foundation in constitutional principle or in experience for the sweeping generalization on which the district court rested its judgment. Religious organizations should be permitted to participate in social welfare programs that have legitimate secular objectives. To the extent that it is shown, in any particular instance, that public funds are *actually* being used for religious indoctrination, judicial remedies are—and always have been—available.

ARGUMENT

I.

THE DISTRICT JUDGE WAS WRONG WHEN HE CONCLUDED, WITH NO SUPPORT IN THE RECORD, THAT IT WAS "SIMPLY UNREALISTIC" FOR RELIGIOUS ORGANIZATIONS TO PARTICIPATE IN SOCIAL WELFARE PROGRAMS WITHOUT INCULCATING RELIGIOUS BELIEFS

The district court's primary constitutional holding—*i.e.*, that the Adolescent Family Life Act ("AFLA") is unconstitutional on its face insofar as it involves the services of religious organizations—rested on Judge Richey's conclusion that such organizations could not participate in counseling and education on the subject of teenage pregnancy without engaging in religious indoctrination. *See Kendrick v. Bowen*, 657 F. Supp. 1547, 1563-1564 (D.D.C. 1987). This was a judicial *ipse dixit*, based on no expert testimony or other credible evidence. It is contrary to fact.

To our knowledge, no Orthodox Jewish organizations have been involved in the administration of the AFLA. But there are analogies to the AFLA in programs that have involved Jewish religious organizations, and counseling has been provided by such organizations under these programs without religious indoctrination.

One example is the area of employment training. With the assistance of public funds, Orthodox Jewish organizations in the New York area have provided career opportunities for thousands of individuals in a variety of fields. Along with training in particular skills, these programs have provided individual and group counseling to equip the trainees for the business world. Specifically, displaced homemakers (such as women who have been recently divorced or widowed) are counseled on adjusting to their new realities. Guidance is also provided to adults with limited English-language ability and to dislocated and older workers.

Given the Orthodox Jewish nature of the organizations providing these services, a disproportionate percentage of its beneficiaries tend to be Orthodox Jews. And in view of the encompassing character of the Orthodox Jewish faith, it is likely that religious questions, such as Sabbath-observance, maintenance of a kosher diet at work, or the wearing of a yarmulke (*see Goldman v. Weinberger*, 106 S.Ct. 1310 (1986)), will arise whenever an Orthodox Jew is employed. Nonetheless, no religious indoctrination or instruction is provided in counseling relating to employment. Indeed, the overwhelming majority of employees involved in these programs are either Jews who are not qualified to teach Jewish religious doctrine or non-Jews.

Other community programs involve guidance for youth and senior citizens. Youth counselors work with various groups, including students in Jewish religious schools to counsel delinquent and potentially delinquent youth. The counselors are employees of Jewish "religious organizations," but the advice they give is secular.

Jewish organizations also conduct counseling programs in the area of family relations. Couples experiencing marital discord or tension, and inability to cope with emotional problems, are advised by counselors who are financed, in part, by government grants. In New York,

these programs sometimes specialize with a particular ethnic or religious group, such as the Hasidic community. Counselors who are familiar with the community and whose expertise includes knowledge of Orthodox religious ritual and principle are assigned to such a distinctive community.

These counseling services do not constitute religious instruction or indoctrination. They proceed, to be sure, within the clients' frame of reference, which includes devout religious observance. But it is simply inaccurate to describe the services as a form of "advancement of religion."

In short, even religious organizations that are "pervasively sectarian," in the sense that their charters require them to adhere to Orthodox Jewish principles and forbid deviations from Jewish religious doctrine,* customarily provide religiously neutral counseling and guidance in many programs that obtain public funding. By a process of self-selection, those who seek such assistance come primarily from the Orthodox Jewish community. These programs do not, however, discriminate in whom they serve, and many non-Jews benefit from them. The assistance given in these circumstances is not, as Judge Richey assumed, inevitably "pressure on 'matters sacred to conscience.'" 657 F. Supp. at 1563. Nor is it "unrealistic" to assume that religious beliefs will not infuse such instruction or guidance. In fact, the experience of Orthodox Jewish organizations has proved the opposite. Guidance in secular areas has been secular in content, even while being sensitive to the religious convictions of those to whom it is administered.

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* Although the district court viewed organizations that are totally committed to religious principle as "pervasively sectarian," we note that such groups frequently provide services that ar entirely secular. We do not, therefore, agree with Judge Richey's definition of the term "pervasively sectarian."

II.

THE DISTRICT JUDGE ERRED IN ENJOINING THE FUNDING OF ACTIVITIES THAT WERE NOT PROVEN, BY A PREPONDERANCE OF THE EVIDENCE, TO BE UNCONSTITUTIONAL

The district court's decision was not based on actual experience or on facts in the record. It was rendered on the bare "possibility" of religious indoctrination. This approach affected not only the portion of Judge Richey's opinion that invalidated the AFLA on its face (657 F. Supp. at 1562-1564), but also that portion of the opinion that held the law to be invalid as applied (657 F. Supp. at 1564-1567). Such invalidation of a federal statute on the basis of a speculative risk was wholly inappropriate.

The district judge declared, in ruling against the AFLA on its face, that the "possibility alone" of religious instruction or indoctrination "amounts to an impermissible advancement of religion." 657 F. Supp. at 1563. In so doing, Judge Richey mistakenly engrafted upon social welfare legislation the extremely rigorous standard that this Court has applied to primary or secondary education conducted in the surroundings of a sectarian school. Compare *Grand Rapids School District v. Ball*, 473 U.S. 373, 388-389 (1985).

The district court ignored various constitutional principles that limit the reach of the rule utilized in the *Grand Rapids* case. *First*, it is clear from this Court's decisions that classroom education is *sui generis*, and that constitutional rules that apply to education do not govern non-educational or non-classroom situations. *Second*, for purposes of the Establishment Clause this Court has consistently distinguished between impressionable children and those who are more mature and independent—including college-age youngsters. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 685-687 (1971). In dealing

with teenage pregnancies, the AFLA straddles these age classifications. Judge Richey assumed that the constitutional rules governing "impressionable youngsters" are in effect (657 F. Supp. at 1561), without considering all the age groups covered by the AFLA and the question whether those who are within the statute's reach are all of "impressionable" age.

In finding the AFLA unconstitutional as applied, Judge Richey also failed to limit his conclusions to evidence established by the record. He determined that some of the religious organizations involved in the AFLA program were "pervasively sectarian" and that several had "explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp. at 1564-1565. Because he felt that the subject of the counseling was "inseparable from religious dogma," he arrived at "the inescapable conclusion . . . that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." 657 F. Supp. at 1565.

The district judge's conclusion was not "inescapable." Nor was it necessarily true that the guidance given to adolescents on the subject of pregnancy was "inseparable" from doctrinal teachings of the religious organizations. To be sure, it was *possible* for religious instruction to be included in such guidance, but the inference that such instruction was actually given could not be drawn from the evidence before Judge Richey.

More serious, however, was the district court's conclusion that if there was one or more instances in which the line had been crossed, the statute would have to be invalidated to the extent that it authorized all funding of activities of any "religious organization." Such a rule punishes *all* "religious organizations" for the sins of a few.

If, in fact, a particular "religious organization" has used its participation in a governmentally financed pro-

gram as a means of teaching religion in violation of the Establishment Clause, courts are available to issue disqualifying injunctive remedies regarding that program and the particular religious organization. Judge Richey was not truly invalidating the AFLA "as applied" when he swept away *all* religious organizations, regardless of how carefully they administered their programs, because one or two were believed by him to be violating the strictures of the Establishment Clause.

This argument does not depend at all on how "pervasively sectarian" the religious organization happens to be. It is, of course, unfair to treat alike all organizations that profess adherence to religious principles, whether or not they are "pervasively" religious. But even groups that may fairly be characterized as "pervasively religious" engage in significant secular activities. Their "pervasively religious" quality should not disqualify them from participation in social welfare programs designed to assist their adherents, as well as others, in meeting the challenges of the modern world.

III.

THE DISTRICT COURT SHOULD NOT HAVE FOUND UNCONSTITUTIONAL "ENTANGLEMENT" WHEN NO GOVERNMENTAL SURVEILLANCE IS CONTEMPLATED

Judge Richey believed that constitutional limits could be maintained only by "extensive and continuous monitoring" that would violate the non-entanglement rule of *Lemon v. Kurtzman*, 403 U.S. 602, 614-615, 622 (1971). 657 F. Supp. at 1567-1568. If the AFLA established a monitoring system that required such surveillance, the district judge's point might have merit. But the statute presumes—as Congress had every right to do—that religious organizations will abide by constitutional strictures. Congress created no surveillance system, relying instead on the availability of administrative or judicial

remedies if any particular religious organization overstepped proper bounds.

In this portion of his opinion, Judge Richey again leaped to the conclusion that the Constitution would be violated—this time by "extensive and continuous monitoring"—when no evidence warranting that conclusion was in the record. Here, as in *Hunt v. McNair*, 413 U.S. 734, 746 (1973), and in *Roemer v. Board of Public Works*, 426 U.S. 736, 762 (1976), the potential for government surveillance is more speculative than real.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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